

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE: . Case No. 01-1139 (JKF)
. .
W.R. GRACE & CO., . 5414 USX Tower Building
. Pittsburgh, PA 15222
. .
Debtor. .
. February 20, 2007
. 10:03 a.m.

TRANSCRIPT OF TELEPHONIC HEARING
BEFORE HONORABLE JUDITH K. FITZGERALD
UNITED STATES BANKRUPTCY COURT JUDGE

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1 THE COURT: Good morning, everyone. This is the
2 matter of W.R. Grace, bankruptcy number 01-1139. There are two
3 matters scheduled this morning. One is the opposition to
4 Foster and Sear's motion for an extension of time to respond to
5 the asbestos questionnaire, and the other is the expedited
6 hearing on a discovery matter. Will you enter your
7 appearances? Oh, well, I'll read the list of what I have, and
8 then I'll if this includes everyone.

9 I have Raymond Mullady, Arlene Krieger, Oscar
10 Mockridge, Jarrad Wright, David Hickerson, Kenneth Thomas,
11 Stephen Blauner, Alex Mueller, Marti Murray, John Herrick, John
12 Macklin, Alan Rich, Sander Esserman, Van Hooker, David Klinger,
13 David Parsons, Natalie Ramsey, Theodore Tacconelli, Noel
14 Burnham, Janet Baer, Amanda Basta, Barbara Harding, Jeffrey
15 Snyder, John Phillips, Nathan Finch, Mark Hurford, and Debra
16 Felder. Is there anyone else on the line?

17 MR. LOCKWOOD: Your Honor, Peter Lockwood is
18 replacing Nathan Finch.

19 THE COURT: All right. Anyone else?

20 (No verbal response)

21 THE COURT: Okay. Then I'm not sure how you want to
22 proceed. Whichever motion you want to start with is fine with
23 me.

24 MS. BAER: Your Honor, this is Janet Baer on behalf
25 of W.R. Grace. I didn't hear David Bernick enter his

1 appearance.

2 MR. BERNICK: No. I'm sorry.

3 MS. BAER: There he is.

4 MR. BERNICK: I was looking at a transcript. I'm
5 sorry, Your Honor. I'm here, and I'm taking Barbara Harding's
6 place.

7 THE COURT: Okay. Is the operator able to turn the
8 sound system up a bit? It's a little bit faint here.

9 OPERATOR: I can try.

10 THE COURT: Okay. I should point out for the record
11 that other than court staff there is no one present in the
12 courtroom. So, okay, Mr. Bernick, do you want to start with
13 the debtor's opposition to Foster and Sear's motion?

14 MR. BERNICK: Yes. This is a -- it seems like an
15 administrative matter, but it really has turned out to be a
16 much more substantial issue, and I'll just have to lay it out
17 for Your Honor, and you'll see that there's more that rises on
18 this than just Foster and Sear at this point.

19 THE COURT: I'm sorry. Mr. Bernick, are you on a
20 speaker phone?

21 MR. BERNICK: No, I'm on a regular phone here.

22 THE COURT: Okay, then can the operator please turn
23 this up? It's very, very faint.

24 OPERATOR: I have to turn up every line individually,
25 and I'm doing that right now.

1 THE COURT: Okay. I'll give you a few seconds.

2 MR. BERNICK: I'll try to speak up here, Your Honor.
3 Is that a little bit better?

4 THE COURT: Yes, it is. Thank you.

5 MR. BERNICK: Okay. The deadline for supplementation
6 of the questionnaire was January 12, and Your Honor will recall
7 that there was a dialogue that took place in January about
8 whether some people should get more time for their
9 supplement --

10 THE COURT: Can you turn that up here?

11 MR. BERNICK: -- and we resisted that, and it looked
12 like there were a small number of people, so basically they
13 were given until January 31. The Foster and Sear people were
14 included in that group. They filed a motion though to be able
15 to get even more time. I think it was a motion to get even
16 more time. Well, it turned out, in fact, that for whatever
17 reason they did not complete their submission by January 31,
18 and they wanted more time. And because these were represented
19 to be supplements to questionnaires that had originally been
20 filed, in the dialogue that I and Mr. Esserman had on the phone
21 with Your Honor, I said, well, if they're just supplements, and
22 they're already being filed, because the representation was
23 that they were being filed, I said that we would not have a
24 problem with that.

25 Well, it turns out that these are not supplements.

1 These are brand new claimants. The deadline originally for new
2 questionnaires to be filed -- that is people who had not filed
3 at all. The original questionnaire deadline was in July of
4 last year, and there has been no extension, no relief from that
5 deadline. Instead, the only additional submissions that have
6 been permitted are supplements. So the questionnaire -- any
7 questionnaire for any claimant should have been submitted in
8 July of last year, in which case these questionnaires -- I
9 understand there to be about 300 of them -- would be completely
10 out of time.

11 Now, they were submitted anyhow, as what's indicated,
12 and in light of the fact that they were submitted, we were
13 prepared to regard their motion for permission to submit as
14 being moot, because they basically had gone ahead and done it
15 already. But it turns out that that was not acceptable to the
16 other side. They do want Your Honor to determine that these
17 supplements -- that these questionnaires -- excuse me -- were
18 timely filed, and that becomes a very big issue.

19 Number one, they're obviously grossly out of time,
20 because they should have been submitted last July. But, two,
21 it turns out that this problem is much more -- much broader
22 than even Foster and Sear. It turns out that there are
23 literally thousands, as we believe right now -- and this is
24 being confirmed -- thousands of new questionnaires that are
25 being turned in basically under the deadlines that apply to

1 supplements. So they are new questionnaires. They're not
2 supplements, and they're coming in months and months late. And
3 essentially what this motion asks for, so far as I can see,
4 that Your Honor now determine that this last straggling group
5 of new questionnaires was timely, which then would mean that
6 all of the other late-filed questionnaires would be timely,
7 which would be fairly traumatic, because I believe we're
8 talking about thousands, perhaps tens of thousands, of
9 questionnaires.

10 MR. HOOKER: Your Honor, this is Van Hooker. This is
11 my motion on behalf of the Foster and Sear firm, and I hate to
12 interrupt David, but it's my understanding from speaking to
13 Amanda last evening that we have agreed upon a form of order to
14 submit to the Court that would resolve this. And, you know,
15 argument is great for everybody else who hasn't filed the
16 motion, but I believe our motion has been resolved.

17 MR. BERNICK: Oh, that's not my understanding. My
18 understanding was that we couldn't reach agreement. That this
19 was simply moot.

20 MR. HOOKER: You know, she sent me an e-mail last
21 night saying that we had approved -- that you had approved the
22 form of order that everybody had circulated.

23 MR. BERNICK: No, I --

24 MR. HOOKER: So we're --

25 MR. BERNICK: Well, I apologize if there's

1 miscommunication, but unless there's an agreement that there's
2 no determination of this Court that these questionnaires have
3 been timely filed and this matter is certainly moot, then there
4 is no agreement. I may have looked at a different --

5 MR. HOOKER: Yes, that's basically what it says. It
6 does say that it is -- as far as it needs an extension past
7 when they were filed, it is -- it's currently moot, and that
8 the Court makes no ruling with regard to the motion itself, and
9 that all parties reserve all rights into the future to complain
10 about the timeliness.

11 MR. BERNICK: That's fine. I apologize for the
12 miscommunication. The reason, Your Honor, this is going to be
13 a big issue front and center, because we are now being told
14 that the other side -- the claimants and the committees will
15 not agree to any extension of our schedule for processing all
16 these thousands of new questionnaires, and that's why this is a
17 very big issue. But for today if they're agreeable that this
18 matter is simply moot, and the Court will then hear I think
19 probably at the next omnibus this whole story -- whole
20 situation with these questionnaires and our need for time to
21 process them, for today that's I guess all we would have to do.

22 MR. HOOKER: Okay. Your Honor, I -- this is Van
23 Hooker again. I apologize. I don't like to interrupt counsel.
24 I do that rarely, but I thought that Mr. Bernick might be
25 misunderstanding that, in fact, we had reached the agreement

1 last night, and I think it is the agreement that he is seeking
2 or certainly does get him to the place he wants to be.

3 THE COURT: Okay. Well, Mr. O'Neal called my office
4 a few minutes before this proceeding started and pointed out
5 that an order had been submitted on -- well, I don't know
6 whether there's -- I guess there's a certification of counsel.
7 My staff didn't print that, but there is apparently an order at
8 docket number 14607 that was file today. Is that the order
9 that you're talking about? Oh, I'm sorry. I apologize. It is
10 on a certification of counsel. I was looking at the order
11 without the COC. It's called supplemental order regarding
12 production of x-rays by non-mesothelioma cancer claimants, and
13 it's related to docket number 13120. Is that the order that
14 you're telling me is the agreed upon order?

15 MR. BERNICK: No, that's a different one. We did
16 reach agreement on the x-rays, and there is an agreed order
17 that was very thoroughly negotiated, and that is -- that matter
18 is just before Your Honor for, we would hope, signature on the
19 order. That's completely agreed. We've worked out all the
20 different aspects of mechanics of the trade. Copies or
21 originals are now due I believe on March the 15th.

22 THE COURT: Okay. Well, then the agreed x-ray
23 submission order I do have here, and I'll sign that one, but I
24 haven't seen one that you're -- you two are talking about with
25 respect to the Foster and Sear issue then.

1 MR. HOOKER: It was -- Your Honor, this is Van
2 Hooker. It was a bit late last night, around 6:00 I think
3 eastern time, and I doubt that a certificate of counsel has
4 been prepared and submitted on that yet, but I expect it would
5 probably be done this morning at some point.

6 MR. BERNICK: Well, I'm prepared on that
7 representation, Your Honor, to go on and to take up the other
8 matter. Our position I think is fairly clear on this. We're
9 going to be before the Court, in any event, on Monday to talk
10 about where things are. The committees have filed a status
11 report that purports to get into why we've got enough, and we
12 don't need anymore time. So this matter's going to come up in
13 the more general proposition, in any event. So we'll take a
14 look for the order, and I'm assuming that counsel's
15 representing this correctly, and that this is moot.

16 THE COURT: All right.

17 MR. BERNICK: That's satisfactory with us.

18 THE COURT: Okay. That's fine. If I get an order on
19 a certification of counsel on the Foster and Sear matter, I'm
20 assuming at this point if you've agreed to it, I will --

21 MR. BERNICK: Yes.

22 THE COURT: -- probably enter it, and then we can
23 deal with anything further. I have not seen anything with
24 respect to Monday's or -- I'm sorry -- next week's hearings
25 yet. Nothing. So I'm not aware of what's on the calendar for

1 next week at this point in time. I just simply haven't seen
2 anything yet. Okay. Let's turn to the next matter then, the
3 expedited motion.

4 MR. BERNICK: Yes, the expedited motion -- and let's
5 make sure that we're now talking about the same thing, because
6 this happened very quickly, and I have to say, Your Honor, that
7 things are hopping so quickly around here that it is difficult
8 to keep track -- relates to the deposition of a Dr. Lucas.

9 THE COURT: Yes.

10 MR. BERNICK: And I think our -- the papers pretty
11 much lay out the state of play. This individual's deposition
12 was sought by a subpoena, you know, pretty much a year ago, and
13 in order to make sure that we wouldn't have a problem with the
14 Health Insurance Portability and Accountability Act, HIPAA, we
15 did file a motion to have it determined that that Act would not
16 be the reason why Dr. Lucas couldn't testify. We filed the
17 motion. Dr. Lucas is agreeable to the motion. The motion is
18 predicated on the -- what I think is fairly clear, which is
19 that the propose of HIPAA was not to foreclose the taking of
20 evidence, and these types of orders are routinely sought and
21 granted in connection with litigation, including the asbestos
22 litigation. That's precisely to free up the individual, so
23 that he can testify.

24 We think it's clear from his own testimony that he's
25 not a treating physician. He's a litigation physician, and as

1 a consequence, he himself doesn't believe that he's actually
2 covered by the Act. The only objection that I understand
3 that's been lodged is that somehow we should have -- while the
4 ACC itself cannot object on the substance of the motion that's
5 being made, they suggest that somehow we have to provide actual
6 notice to all of the people who might have been or might be Dr.
7 Lucas' patient, so that if they want to come forward and
8 object, they should come forward, because they have the
9 opportunity to do that.

10 We don't believe that that's required nor that it
11 might be feasible for us to do it. The person who's got the
12 burden of notification is Dr. Lucas himself, even assuming that
13 he were covered by HIPAA. So this is -- it's just very
14 standard procedure. It's very clear, and, you know, at the end
15 of the day it's - it would simply be something that would delay
16 the deposition. I think the delay is half the job at this
17 point, because again you're not all here. They want to cut off
18 our ability to really discuss the further processing of data
19 that we need to do. This is now kind of a larger plan to use
20 the timing of the case management process to foreclose our
21 discovery, and this is just another example of it.

22 THE COURT: Okay.

23 MR. RICH: Your Honor, this -- I'm sorry. This is
24 Alan Rich, Your Honor. We file an objection yesterday
25 afternoon, which I hope Your Honor received, since it was

1 emailed.

2 THE COURT: I got it, but who are you representing,
3 Mr. Rich?

4 MR. RICH: We represent approximately 15 hundred
5 individuals who have retained Dr. Lucas -- a total of about 15
6 hundred.

7 MR. BERNICK: I've not even received the objection.

8 MR. RICH: Well, all your folks are on the ECF
9 receipt list.

10 MR. BERNICK: Well, that's great, but I'm sitting
11 here in New York, and I don't have it.

12 THE COURT: Okay. Mr. Rich, you're going to have to
13 speak up.

14 MR. RICH: I'm sorry. I've got the phone close up to
15 my mouth, and I'm on a real telephone.

16 THE COURT: Okay.

17 MR. RICH: I don't -- I disagree with Mr. Bernick's
18 characterization of this is just some routine situation. It's
19 true that individuals often sign releases of HIPAA -- of their
20 HIPAA rights, but it is not routine that courts enter orders
21 saying that physicians performing services are exempt from
22 HIPAA. That is far from routine. In fact, that is very
23 unusual. The only orders of that --

24 THE COURT: These individuals are involved in
25 litigation, and HIPAA is pretty clear that if you're involved

1 in litigation, you know, you're filing a claim potentially
2 against an -- because of asbestos-related diseases. How are
3 you going to meet your burden of proof with respect to the
4 claim that you're filing without the evidence of the asbestos
5 disease? HIPAA is very clear that the purpose is not to
6 prohibit the parties who need discovery from getting the
7 discovery, and it's also very clear that provided that the
8 Court also makes reasonable efforts to make sure that the
9 covered entity either gets the documents back or that the
10 documents are ordered destroyed at the end of the litigation,
11 and that they're used only for the purpose of the litigation,
12 that there are no other rights by the individual entity. So
13 I'm really not sure what the issue is.

14 MR. RICH: Well, the issue is they're seeking an
15 order, Your Honor, the exempts Dr. Lucas from HIPAA. It is one
16 thing to say that because of a posture that is -- that these
17 folks are in that the provisions of HIPAA are overridden. It
18 is another thing to say that he's exempt from HIPAA to begin
19 with. I think one thing they're asking is for the wrong
20 relief, number one. They're asking for a finding from this
21 Court that a person who is in Dr. Lucas' position, i.e., a
22 person who takes x-rays and performs diagnostic tests, is
23 exempt from the Act entirely, simply because he's doing it in
24 the context that involves litigation, and that is just wrong.
25 He is covered by HIPAA.

1 Now, if there are exceptions to it because of
2 litigation, just like if there's exceptions to physician-
3 patient privilege or there's exceptions to privacy rights,
4 etcetera, etcetera, it's different from not having those rights
5 in the first instance. That's the first problem I have with
6 the order they submitted and the relief they're seeking.

7 Secondly, I think the problem is -- another problem
8 is the fact that no one is getting notice of this.

9 THE COURT: But it doesn't require anybody to get
10 notice of this, not from the debtor. I mean if Dr. Lucas has a
11 requirement to provide that notice, then that's one thing, but
12 this order doesn't deal with who has to provide notice. It
13 only deals with the fact that the deposition can go forward,
14 and, quite frankly, when you're in a litigation mode, you're
15 subject to litigation. HIPAA doesn't provide a litigation
16 privilege for these -- for anybody who is using -- who has to
17 produce some type of proof of a medical condition in order to
18 prove an injury. So if you go to a diagnostic physician for
19 purposes of getting a diagnosis to show that, in fact, you've
20 got some asbestos-related disease, I don't know what you think
21 is going to be done with that diagnosis, except that it's going
22 to be used to prove the fact that you have a diagnosis. Why
23 else are you getting it?

24 MR. RICH: There's a number of reasons why you might
25 be getting it. Number one, there's some of the clients who we

1 represent have retained Dr. Lucas as a consulting only expert,
2 and that HIPAA certainly doesn't provide a sword to get at
3 consulting expert documents, and if the proper notices would
4 have been given, maybe we wouldn't have been in this posture
5 when it comes to trying to litigate that issue through --

6 THE COURT: But they -- if they're entitled to
7 notice, they're entitled to it from Dr. Lucas not from the
8 debtor. There is nothing in HIPAA that says that if, in fact,
9 discovery is going forward, that the person who is seeking the
10 discovery has to try to figure out who Dr. Lucas' patients are
11 and to give them notice. It's the covered entity that has the
12 obligations to provide the notice not the person who's trying
13 to take the discovery. How can the debtor possibly know who
14 Dr. Lucas' patients are before they even get the discovery?
15 That doesn't make any sense.

16 MR. HURFORD: Your Honor, this is Mark Hurford. Can
17 I respond to this issue, since we also object on the notice
18 issue?

19 THE COURT: Well, let me finish with one person at a
20 time, please. Mr. Rich --

21 MR. HURFORD: Certainly.

22 THE COURT: -- has the podium at the moment. Mr.
23 Rich.

24 MR. RICH: Yes.

25 MR. HURFORD: I apologize.

1 MR. RICH: Your Honor, as I said, I think if the --
2 the most -- the thing that I most -- have the most difficulty
3 with is the fact that they're seeking an order from the Court
4 which seeks the Court's blessing on the legal conclusion that a
5 person in Dr. Lucas' position, a person who is doing diagnostic
6 tests and providing physician services, is not even covered by
7 HIPAA, simply because it's related to litigation.

8 THE COURT: Well, I mean I don't know the facts well
9 enough, frankly, to determine whether he is or isn't covered.
10 For example, no one's told me whether he provides electronic
11 notice of anything. He may not be covered, because he may not
12 be providing electronic notice. So I don't know whether he is
13 or isn't covered, but I don't think I need to go that far. The
14 reality is this is litigation. The debtor needs this
15 discovery. The debtor's going to get the discovery, and I'm
16 going to issue a court order that protects the rights as HIPAA
17 requires that prohibits the parties from using or disclosing
18 this protective health information for purposes other than this
19 litigation, and that requires either the return or the
20 destruction of the documents at the end of the litigation.
21 That's what HIPAA requires. That's what I'm going to do.

22 MR. BERNICK: Okay. Should we just -- would it be
23 best if we -- do you want us to just draft up something and
24 circulate it, or --

25 THE COURT: Yes.

1 MR. BERNICK: -- what would be your preference?

2 THE COURT: I think that would be better, because I
3 simply don't see why I need to determine whether he is or isn't
4 covered. The HIPAA provides for a litigation exception, so
5 whether he's covered or not, it seems to me that it's clear
6 that the litigation exception applies. So, Mr. Rich, does that
7 take care of your objection?

8 MR. BERNICK: I'm sorry, Your Honor, was that to the
9 ACC?

10 THE COURT: No, it was to Mr. Rich. Does that take
11 care of your objection, sir?

12 MR. RICH: That would've -- that would take care of
13 my objection, an order in the form that you set out except for
14 the issue of the consulting-only experts. But I understand
15 that, you know, Your Honor has ruled on that issue in a
16 separate context, but I guess those objections would be taken
17 care of in that other context.

18 THE COURT: Okay. Well, then I'll ask the debtor
19 when the order is drafted to run it by you to make sure that it
20 tracks the language of the CFR or HIPAA for the purposes of
21 making sure that it does resolve that objection. But the
22 language is included in the CFR, and I'm not sure I have the
23 correct cite in front of me, but I think it's at 45 CFR
24 164(5)(12), if I have the page open to the right section.

25 MR. BERNICK: Yes --

1 THE COURT: Yes.

2 MR. BERNICK: -- it's a forestalled dialogue, Your
3 Honor, on this consultancy privilege. There's nothing about
4 our motion that implicates the consultancy privilege -- that
5 all consultancy privilege is there. It would have to raised as
6 a matter in a timely fashion, and that hasn't been raised. We
7 simply sought the ruling under HIPAA, and we do not intend to
8 include in the draft order anything that addresses any other
9 issues. This is just a very clean and simple issue. So I'm
10 not sure what the relevance is at this point of some assertion
11 about the consultant's privilege.

12 THE COURT: All right. Well, in any event, Mr.
13 Hurford.

14 MR. HURFORD: Your Honor, I guess I'm not really sure
15 what I can say. It sounds like you're pretty far down the
16 line. You know, our issue was that the notice is not being
17 provided to the claimants, and Grace certainly has at least
18 questionnaires from people who identified Dr. Lucas on their
19 questionnaires. So I don't think that Grace has absolutely no
20 idea of who Dr. Lucas saw, and they certainly could --

21 THE COURT: Where in HIPAA or in the CFR is the
22 requirement that the debtor provide this notice? I mean this
23 appears to me on behalf of the ACC to really approach -- I'm
24 not sure where the ACC's standing is. You keep telling me that
25 you don't represent these individuals, and the first statement

1 in the response that you file is that you don't have an
2 objection on the merits, and then you proceed to say that the
3 debtor has some notice obligation. To the extent that you know
4 who the patients are, the ACC has a notice obligation. This
5 comes as close to a bad faith objection as I have seen the ACC
6 behave in this case, and I hope not to see this type of action
7 again. Now, where in HIPAA is the obligation on behalf of the
8 person who is trying to obtain the discovery to try to figure
9 out who it is that's supposed to get notice before they even
10 get the discovery? Now how can that work?

11 MR. HURFORD: But, Your Honor, the motion was filed
12 as an agreed motion between Dr. Lucas and the debtors, and,
13 frankly, if Dr. Lucas provides the notice, then that would
14 solve our concerns. I think -- our position is somebody needs
15 to provide the notice. And, Your Honor, on your other comment
16 I can assure you that this was not a bad faith motion. We
17 reached out to the debtors before the -- or a bad faith
18 objection. We reached out to the debtors before we filed the
19 objection, had a conference call with the debtors. I discussed
20 it with Jan Baer. We discussed our point of view. They
21 discussed their point of view. Our hope was that the only
22 result of this was that notice would go out to these claimants.
23 And like I said, I actually confirmed with them --

24 THE COURT: Where in HIPAA is the requirement that
25 the person seeking the discovery has a notice obligation? How

1 can it work?

2 MR. HURFORD: I think there's a -- I think you're not
3 understanding my response, because I think we looked at the
4 motion being different. We looked at the motion as an agreed
5 motion, basically a joint motion between the debtors and Grace.
6 And although Grace picked part of the objection to talk about
7 Grace providing the objection, most of the objection talks
8 about somebody giving notice to the individual claimants.

9 Our concern is that there is very little factual
10 information to support the motion. The original motion
11 basically had no factual support. There was no affidavit.
12 There was no declaration as to the facts as it applies to
13 HIPAA. The reply added some additional information, which was
14 really a deposition transcript from some State Court proceeding
15 in 2002, so our concern was that there may be claimants who
16 take a different point of view as to the scope of testimony
17 that's sought by him, and that those people should at least
18 know.

19 THE COURT: Well, that's fine.

20 MR. HURFORD: I understand where Your Honor's headed.
21 I can assure you that this is by no means a bad faith
22 objection. We've had nothing to do with the delay in this
23 deposition moving forward from when it was originally noticed
24 until now, and in all honestly, Your Honor, we filed the
25 objection within a few days of the motion being filed. So the

1 timeliness issue and some argument that we've been trying to
2 delay this is just completely untrue.

3 THE COURT: I don't know about a delay issue. That's
4 not the scope of my concern. The scope of my concern is that
5 to the extent that the ACC has some fiduciary obligation to
6 these entities, whoever they are, then it's the ACC who ought
7 to get its act together and provide the notice if you think
8 notice is required. How is the debtor, who doesn't know who
9 the individuals are, who is attempting to ascertain who the
10 individuals are by taking the deposition, supposed to give the
11 notice that HIPAA prevents them from providing, because they
12 don't even know who the entities are? Now --

13 MR. HURFORD: They do. They do, Your Honor, because
14 there were claimants who identified Dr. Lucas in their
15 questionnaire responses.

16 THE COURT: And you keep telling me on behalf of the
17 ACC that this is not individual claims litigation, and the
18 purpose for this discovery is to ascertain whether the
19 methodology and the basis on which the information that is
20 being -- going to be submitted to the experts has some
21 credibility as a global matter not as to an individual claim
22 essentially but as a global construct. That's the point of
23 this type of discovery. So if that's the case, what is the
24 individual's standing with respect to looking at these
25 discovery issues? I mean the ACC I think keeps arguing both

1 sides of the coin, and every time I try to pin you down as to
2 what position you're going to take with respect to the
3 individuals, you tell me none. But every time you raise an
4 objection, it's on behalf of the individuals. Now, you can't
5 keep having it both ways. You've got to figure out which
6 litigation strategy you're taking and stick to it.

7 MR. HURFORD: Well, Your Honor, in a situation where
8 the individual claimants have not been given notice, if we saw
9 that it was the obligation of the ACC to step in and say that
10 they should, if they would've filed individual objections, we
11 wouldn't get involved in that. When individuals have come
12 forward and argued things specific to them, we have not gotten
13 involved in that. If individuals were to step forward --
14 frankly, I didn't even know Mr. Rich was to be on the phone
15 arguing this today. If individuals were to step forward, we
16 would not have gotten involved in that. Our concern was that
17 the individuals didn't know. We saw this as our obligation
18 generally to the constituency that, hey, they should at least
19 know. But with individual, law firm claimant specific issues,
20 we don't get involved in that.

21 THE COURT: That's a lot of words that didn't tell me
22 much, with all due respect. All right. My ruling is what I
23 said. It appears to me that with respect to HIPAA, I do not
24 need to make a determination whether Dr. Lucas is or isn't
25 covered, because whether he is or not, HIPAA provides for a

1 litigation exception to the discovery, and in this instance,
2 the discovery is appropriate because of the nature of the
3 litigation and the fact that for diagnostic purposes the
4 information is something that the debtor needs in order to take
5 a look at the claims for estimation purposes. However, HIPAA
6 or the CFR also provide that the information is only to be used
7 in the course of a litigation, and then either to be returned
8 or destroyed. Either or is in the statute or in the CFR --
9 pardon me. If you have a preference for one or the other, you
10 may put it in. You can give yourselves the alternative. I
11 don't care. The CFR gives you the ability to do both. You can
12 work out those details, and I will sign that order when you
13 submit it. Mr. Bernick, please run it by both the ACC and Mr.
14 Rich.

15 MR. BERNICK: Will do.

16 THE COURT: All right. Anything more for today?

17 MR. BERNICK: I don't think at least from the
18 debtor's point of view.

19 THE COURT: Okay. We're adjourned. Thank you.

20 MR. BERNICK: Thank you.

21 UNIDENTIFIED ATTORNEY: Thank you, Your Honor.

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CERTIFICATION

I, PATRICIA C. REPKO, court approved transcriber,
certify that the foregoing is a correct transcript from the
official electronic sound recording of the proceedings in the
above-entitled matter to the best of my ability.

/s/ Patricia C. Repko
PATRICIA C. REPKO
J&J COURT TRANSCRIBERS, INC.

Date: February 22, 2007

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